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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JONIE GARDNER LEE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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Counsel for Petitioner respectfully submits this Supplemental Memorandum in reply to Memorandum for Respondent, filed herein.

Petitioner, through his Counsel, has heretofore submitted to this Court that the real question involved herein was as follows:

"Did the District Court and the Circuit Court of Appeals for the Fourth Circuit, so interpret Rule 41(e) and Local Rule 3, in their respective capacities, as to deprive petitioner of his Constitutional rights against wrongful and unreasonable trespass and seizure of his private property, at his place of residence, without first

obtaining a search warrant, thereby violating the Fourth Amendment to the Constitution of the United States, and thereby depriving petitioner of his right to be free from such trespass?" Petition, p. 2, ¶ 2.

The memorandum filed by the Respondent failed to meet, by substantial argument or citation, the argument and authorities therefor submitted by Petitioner on pages 4, 5, and 6 of his petition for certiorari.

As set forth fully in Petitioner's request for certiorari, the District Court rejected, and refused to consider as timely filed, Petitioner's motion to suppress the unlawfully seized evidence taken from his private residence without a search warrant, although said motion was filed in strict conformity to Rule 41(e) of the Rules for Criminal Procedure adopted by this Court to control criminal procedures in all of the Federal Courts of the United States.

It was obvious error for the District Court to hold that the motion to suppress was not filed on time, when the record showed that it was filed before arraingment for trial—which is all that is required by Federal Rule 41(e). Local Rule 3 was treated as effective when, on its face, it is contradictory of and contravenes said Rule 41(e), thereby giving to the District Court Rule, Local Rule 3, superiority over Federal Rule 41(e). (See page 5 of Petition for Certiorari.)

It was also obvious error for the District Court to render a decision upon Petitioner's motion to suppress and at the same time to reject said motion on what was determined by the District Court's Order as a ruling "on the merits". How could Petitioner's motion to suppress be rejected, as not timely filed and then adversely considered by the District Court judge as though it had been received and acted upon after a judicial hearing?

Counsel for Respondent suggests in his brief that it was unnecessary to urge the question of timeliness since

the motion was denied on its merits. No authority is cited for this inconsistent action, and we submit that it was obviously a deprivation of Petitioner's right to have his motion to suppress fully considered and acted upon in a proper and judicial manner in conformity with Rule 41(e) of this Court.

Counsel for Respondent, in his Memorandum (page 4, paragraph 1), makes a statement which demands attention. He says that:

> "It is questionable whether the act of the arresting officers in passing through petitioner's house to admit the officer stationed at the rear door constituted a 'search'. Even if it should be so regarded, however, petitioner was already in custody."

We do not think it "questionable" at all, since the search was made by agents of the Respondent by a forcible search of Petitioner's person and the procurement of keys from his pockets after such agents had gone through his premises to determine what additional search and seizure they might be able to make while there, in and on Petitioner's premises.

There is no dispute that Petitioner had already been arrested and was not resisting in any way the lawful acts of the agents of respondent; nor is it denied that his keys were forcibly taken from his person and against his will, and that immediately thereafter they were used to open a room in his private residence and his private property seized and used as evidence to convict him.

It should be noted that the last sentence of the above-quoted paragraph 2, page 4, of Respondent's Memorandum states that, even if the above actions of the defendant's agents could be treated as a "search", this would not be significant, since "petitioner was already in custody". Petitioner's counsel respectfully submits that this statement

is not only erroneous in law, but is an aggravation of the search and seizure.

Certainly Petitioner's being in custody, under a legal arrest by the agents of respondent, could not justify taking advantage of this arrest to treat custody of petitioner as giving to Respondent's agents a right to go through his private property, where he lived with his family, in the manner described in the record before the District Court, the Fourth Circuit Court of Appeals, and in petitioner's statement of facts herein. (See Petitioner's Statement of Facts, in his Petition, pages 3 and 4.)

Counsel for Respondent in the Memorandum filed in this Court states that the actions of the agents of Respondent were justified under the authority of *Weeks* v. *United States*, 232 U.S. 383; and *Agnello* v. *United States*, 269 U.S. 20.

We submit that a thoroughgoing study of these citations will show that they do not support the contentions made as to their effect upon a case similar to the present case. There are many distinctions to be drawn between parts of the *Weeks* case and the *Agnello* case, when they are compared with the case at Bar.

Counsel for Respondent in their Memorandum also cite, at page 5, the case of *United States* v. *Rabinowitz*, 339 U.S. 56; and *Harris* v. *United States*, 331 U.S. 195.

The *Rabinowitz* case is easily distinguishable from the case at Bar, since that case involved a search of a room used by the defendant as an office where the public could call, and not a private residence restricted to the use of his family who made their home therein. This was a distinction drawn by this Court.

To summarize the opinion in the *Rabinowitz* case; the right to search without a search warrant is based solely on a necessity to guard against some threat by defendant

either to resist, to conceal assets or to remove property from its present status. See paragraph 4, Petitioner's Petition for Certiorari, page 10.

Further referring to the case of *Harris* v. *United States*, 331 U.S. 145; that decision was arrived at on account of a finding by the Court of Appeals that the search complained of was "not a general exploratory search". Here, it seems it would have been impossible to make a more exploratory search of petitioner's premises, than was made; since Respondent's agents seized and used keys, obtained by force, to search a room, which they entered with said keys against the will of Petitioner—said room being part of the private residence of Petitioner and his family and the only room not previously explored from front to rear.

The Respondent's counsel, in their Memorandum, also cite the case of *Agnello* v. *United States*, 269 U.S. 20. In the *Agnello* case, a search and seizure of a defendant's office was declared valid, as the defendant was then committing a crime in the presence of the agents of the Government.—No such conditions existed here.

SOME RECENT RELEVANT CASES NOT HERETOFORE CITED

In *McDonald* v. *United States*, 335 U.S. 451, agents of the defendant forced their way into a portion of his premises and made an arrest for book-making, believing that the defendant was operating a book-making joint and basing such belief upon what they thought was the noise from the operation of a typewriter. The right to make such a search and seizure without a search warrant was denied by this Court in a strong opinion by Associate Justice Douglas, from which we quote:

> "This guarantee (the 4th Amendment) of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It means the right of privacy, as one of the unique values of our civilization

> and with few exceptions stays the hands of the police, unless they have a search warrant".

The more recent cases which should be considered and reviewed, which support the Petitioner's application for certiorari, include the case of *Roth* v. *United States*, 354 U.S. 476; *Davis* v. *United States*, 328 U.S. 582 (Fourth Circuit Court of Appeals); *Marcus* v. *United States*, 367 U.S. 717. We urge that these more recent cases condemn such seizures and searches as involved in the pending case, and justify the Court's acting favorably to Petitioner's request for certiorari.

In an opinion by the Fourth Circuit Court of Appeals, before Judges Boreman, Bryan, and Bell, Case No. 8543, decision dated November 5, 1962, that Court rendered a decision with a legal effect very different from that rendered in the case at Bar against Petitioner showing a development of the law, and the growth of a more and more solicitous attitude to the rights of the citizen. We quote from page 21 of the published decision of the Fourth Circuit Court, in the case of *United States* v. *Peisner*:

> "Bearing in mind the constitutionally protected freedom of expression as guaranteed by the First Amendment, and the constitutionally protected right of the people to be secure in their 'papers and effects' against unreasonable searches and seizures as guaranteed by the Fourth Amendment, we reach the conclusion that here the requisite standard of probable cause for the search, seizure and arrests was not met. To repeat for emphasis, *Government* is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected expression. *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, supra."

Petitioner's prayer for certiorari herein urges that the search and seizure in his case show serious departures from the above principles guaranteed by the 4th Amendment. In Petitioner's case *probable cause* for the seizure

and search complained of was totally lacking,—was not even supported by the clicking of a typewriter, as in the *Heitner* case.

As will be noted, the *Heitner* case was decided by the 4th Circuit Court of Appeals, just a few weeks after Petitioner's unfavorable verdict and sentence and the decision against him on appeal to said 4th Circuit Court of Appeals.

The above quotation is a terse statement on the rights of the citizen to be protected from unreasonable searches and seizures of his property or papers in his private family home or residence and it certainly supports the numerous decisions of this Court cited in Petitioner's prayer for the Writ of Certiorari, and we submit that the Memorandum in Opposition thereto utterly fails to submit authoritative decisions of this Court to the contrary.

In view of the citations herein and those heretofore cited in the Petition for Certiorari, we again earnestly urge that the Writ of Certiorari should be granted and, upon full consideration of the case, that the indictment against Petitioner be discharged.

Respectfully submitted,

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